IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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NATANAEL RIVERA,

ORDER

Plaintiff,

12-cv-240-bbc

v.

MICHAEL SCHULTZ, SAMUEL MENNING,
LAWRENCE PETERSON and JOHN DOE,

Defendants.[1]

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Plaintiff Natanael Rivera has filed a document that he calls "Memorandum." Dkt. #35. The document is difficult to understand, but he seems to be arguing that he is unable to respond to defendants' summary judgment motion for various reasons. I am denying plaintiff's motion as unnecessary because it is clear that defendants cannot prevail on their motion.

Defendants seek summary judgment on the ground that plaintiff failed to exhaust his administrative remedies on his claim that defendants subjected him to a strip search in violation of the Eighth Amendment. Their brief in support of the motion is less than three pages and consists primarily of boilerplate regarding the standard for exhaustion under 42 U.S.C. § 1997e(a). Dkt. #31. The only discussion of the facts of the case is a short

[1] I have amended the caption to reflect the full and correct spelling of defendants' names, as identified in the acceptance of service. Dkt. #21.

paragraph at the end of the brief: "The Affidavit of Welcome Rose establishes that the plaintiff filed one inmate complaints [sic] concerning the claim on which he was allowed to proceed but failed to timely appeal it. Consequently, he has failed to exhaust his administrative remedies, and the case should be dismissed." Id. at 2.

Defendants are correct that the general rule is that a prisoner must "properly take each step within the administrative process," Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002), which includes following instructions for filing the initial grievance, Cannon v. Washington, 418 F.3d 714, 718 (7th Cir. 2005), as well as filing all necessary appeals, Burrell v. Powers, 431 F.3d 282, 284-85 (7th Cir. 2005), "in the place, and at the time, the prison's administrative rules require." Pozo, 286 F.3d at 1025. In addition, I agree with defendants that the records they submitted show that one of plaintiff's appeals was rejected as untimely. Dkt. #32-1 at 11.

However, defendants have ignored two important facts. First, the rejected appeal was the *second* appeal plaintiff tried to file. His first appeal was rejected not for untimeliness but because he used the wrong form. Dkt. #32-1 at 7. The official reviewing the second appeal did not consider whether the mistake qualified as good cause to excuse the delay. Wis. Admin. Code § DOC 310.13(2) ("Upon good cause, the [examiner] may accept for review an appeal filed later than 10 calendar days after receipt of the decision.").

I need not decide whether plaintiff had good cause for a late appeal because a review of the decision on the original grievance shows that the inmate complaint examiner ended the process, making any appeals irrelevant. In dismissing the grievance, the examiner did

not consider the merits, but informed plaintiff that the matter was already being addressed in another proceeding:

> Because the allegations raised in his complaint have already been brought to the attention of supervisory staff and are already under review, there is no need to conduct a parallel investigation in the ICRS. The allegations are being addressed in a manner similar to DAI Policy 310.00.01. Because that investigation process is regulated by state law and collective bargaining agreements which protect the privacy and due process rights of staff, no further information will be given to the complainant.

Dkt. #32-1 at 5. Thus, the examiner instructed plaintiff that he could not use the grievance process with respect to this particular issue.

I have stated in previous cases that prison officials may not tell prisoners that they should not or cannot use the grievance process and then later seek to dismiss a lawsuit on the ground that the prisoner failed to complete that process. Shaw v. Jahnke, 607 F. Supp. 2d 1005, 1009 (W.D. Wis. 2009). See also Dale v. Lappin, 376 F.3d 652, 656 (7th Cir. 2004) (dismissal not appropriate when prisoner failed to complete grievance process because he relied on information provided by prison officials). This is because "[t]he grievance process is not intended to be a game of 'gotcha' or a test of the prisoner's fortitude or ability to outsmart the system." Shaw, 607 F. Supp. 2d at 1010 (internal quotations omitted). Once the examiner told plaintiff that his grievance was being addressed in another forum, he no longer had an available administrative remedy or anything left to exhaust. Accordingly, I conclude that defendants have failed to show that dismissal is appropriate under § 1997e(a).

In the preliminary pretrial conference order, the magistrate judge declined to set

deadlines for the remainder of the case in light of the possibility that the court would grant defendants' summary judgment motion. Dkt. #34. Now that I have denied that motion, a new scheduling conference is necessary.

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by defendants Samuel Menning, Lawrence Peterson and Michael Schultz, dkt. #30, is DENIED.

2. Plaintiff Natanael Rivera's motion titled "Memorandum," dkt. #35, is DENIED as moot.

3. The clerk of court is directed to set a new scheduling conference before the magistrate judge.

Entered this 11th day of October, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge